

**Comments on the FAR Interim Rule  
FAC 90-42, FAR Case 91-118  
Mandatory EFT (48 CFR Ch. 1)**

**Submitted by The Financial Management Service, U.S. Treasury  
October 28, 1996**

**I. EFT Compliance with Treasury Rule**

In several instances throughout the FAR interim rule, reference is made to certain classes of payments which the FAR claims have been exempted from the provisions of the mandatory EFT legislation. There is only one circumstance under which any exception to the law is allowed. Public Law 104-134 amends 31 U.S.C. 3332 to require Federal payments to be made by EFT unless recipients certify in writing that they do not have a bank account. This is the only waiver provision that will be granted to any Federal payment recipient. Further 31 CFR 208 does not require EFT payment to Federal payment recipients who became eligible for that payment before July 26, 1996. The FAR is overstepping its authorities in designating any contract as being exempt from the provisions of the mandatory EFT legislation. The Treasury has the sole authority to exempt any payment from being made via EFT and will address any exemptions in the Treasury final rule on mandatory EFT.

Treasury is hosting an Interagency EFT Policy Workgroup to analyze payments and factors affecting the ability to convert payments which are in some way problematic. The work of this group will be considered in the formulation of a final Treasury rule on mandatory EFT. In addition, Treasury is meeting with individual agencies to discuss agency implementation efforts and what obstacles exist or can be foreseen in converting payments to EFT.

As a practical matter, Treasury recognizes that some payments cannot be made via EFT because of a limitation of agency payment systems. 31 C.F.R. 208.3(c) provides for these payments not as an exemption from the provisions of the law, but as a recognized impediment to converting payments to EFT. This exemption is temporary, however, and agencies are expected to work very closely with FMS to determine how, when or whether these systems limitations will be eliminated.

The preamble of 31 C.F.R. 208 also states that there is no expectation that payments which cannot be made via EFT because of systems limitations will be suspended. That is not the same thing as saying that a contract type is exempted, which significantly shuts the door on conversion efforts and solutions resulting from those efforts. The FAR even goes to far to say that foreign currency contracts are exempt and that, furthermore, EFT may **not** be used even though foreign currency payments have been made via EFT in the past and efforts are underway to expand

International Direct Deposit to include foreign commercial payments.

These instructions are inconsistent with the legislation and 31 C.F.R. 208 and may have a chilling effect on efforts to promote EFT for the payment types the FAR has indicated are exempt. Treasury is using the interim period, until the publication of the final rule, to determine how these payments can be made via EFT. Beyond the matter of the FAR overstepping its authorities, the FAR has acted prematurely in characterizing certain payment classes as being incapable of being made via EFT.

In light of the discussion above, FMS suggests the following rewording of 32.1101 and other sections:

All references in any section of the FAR to exemptions beyond unbanked certifications and agency system limitations, should be struck.

32.1101(d) should read in its entirety: “Payment by EFT is the required method of contract payment in most contracting situations. However, in accordance with 31 C.F.R. 208.3(c), it is recognized that some payments will not be made via EFT because a Contractor is not newly eligible as defined in 31 CFR 208(a)(4); because a Contractor certifies in writing that it does not have a bank account; or because an agency is incapable of initiating an EFT payment request. In these cases, payments may continue to be made by means other than EFT. Use of systems limitation by agencies is restricted to those agencies who have notified the Treasury in writing that their systems will not produce an EFT payment request and who will submit an implementation plan to Treasury in accordance with 31 C.F.R. 208.3(c). Notwithstanding the above, the collection of the TIN is mandatory in all cases.

“Systems may be defined broadly to include payment systems on the receiving end, for instance, payments made to foreign banks in countries which do not have EFT capability or a payment to a Contractor in a military or disaster zone where there is no mechanism to initiate or receive an EFT payment. Systems limitations also includes systems hardwired to not initiate an EFT payment because of national security or other classified or law enforcement activities.

“Examples of these types of payments include 1) contracts awarded by contracting officer outside the United States and Puerto Rico; 2) contracts denominated or paid in other than United States dollars; 3) classified contracts (see 4.401); and 4) contracts executed by deployed contracting officers in the course of military operations, including contingency and emergency operations, such as responses to natural disasters or national or civil emergencies.”

Also of extreme concern to Treasury is the way in which the FAR interprets the Act and 31 CFR

208 as it relates to section (j) of FAR contract clauses 32-232.33 and 32-232.34 where discretion is given to a Contractor to request a waiver from EFT payment. This interpretation of the legislation and Treasury interim rule 31 C.F.R. 208 is wrong. The Treasury interim rule and the legislation itself is very clear about the provisions for waivers for the unbanked and the recognition of systems problems with agencies. In no place in either document could it be interpreted that giving Contractors the right to petition for exemption is allowed and in no statute is the FAR given powers of interpreting the legislation beyond what is stated in the Treasury interim rule.

Other sections of the FAR, while not necessarily the intent of the section, seem to imply that EFT payments are, in fact, not mandatory. For instance, wording like “Payment by EFT is the **preferred** method...” (discussed above) and “... required payment by EFT in **certain situations**” appear to assign less weight to the provisions of the legislation which require EFT for all payments, except for the unbanked and agency systems limitations. In light of the above discussion,

Treasury recommends striking section (j) from 52.232-33 and 52.232-34 and any other contract clause.

32.1101(a) “...requires payment by EFT in certain situations.” should read “...requires payment by EFT in all situations except when a Contractor is not newly eligible as defined in 31 CFR 208(a)(4); a recipient certifies there is no bank account; or an agency is unable to initiate an EFT payment request.”

52.232-33(a) “... may be made by check or electronic funds transfer at the option of the government” should read “...shall be made by electronic funds transfer except when a Contractor is not newly eligible as defined in 31 CFR 208(a)(4); a recipient certifies there is no bank account; or an agency is unable to initiate an EFT payment request.”

## **II. Collection of TIN and EFT Information**

The FAR interim rule directs contractors to submit banking information, waivers for the unbanked and any changes to current information required to make a Federal EFT payment, directly to the agency payment office as a condition for payment. Notification of the requirement to submit EFT information is made at the point of solicitation for small purchases and is contained in contract clauses to be used in all contracts. While these efforts would go a long way in ensuring a successful implementation of mandatory EFT, a stronger approach is justified.

In order to ensure that the Federal government is doing business only with those vendors who are willing and able to accept EFT payments and consequently the only way to ensure that all payments are made electronically, is if submission of payment information is made a condition for awarding a contract, issuing a purchase order or in any other way initiating a contractual

relationship with a vendor. The term payment information includes banking information (bank account and unbanked certifications) and Taxpayers Identification Numbers (TINs).

Taxpayer Identification Numbers are now required by the Debt Collection Act of 1996 to be collected from any entity doing business with the Federal government included with a payment instruction. It will be a valuable tool in reducing almost 52 billion dollars owed annually to the Federal government. While making submission of payment information a condition for payment will assuredly result in an increased rate of EFT conversion and debt collection, only by making it a condition of award will the timely and successful conversion of all vendor payments to EFT and the collection of debts owed the federal government be virtually guaranteed.

Furthermore, in order to successfully implement a policy of the submission of EFT information as a condition of award, payment information should be collected and managed by the contracting office, and not, as the FAR is proposing, by the payment office.

Requiring the submission of payment information as a condition of award provides assurance of an EFT payment. Whereas it would be possible to pay a vendor by means other than EFT if payment information is never received or is received erroneously, requiring and verifying banking information up front eliminates this possibility. The FAR itself provides for check payment in the event EFT information is erroneously submitted (See 52.232-33(g)(ii)).

If the submission of this information is a condition for award, from a practical point of view the contracting office is in the best position to collect and manage the information and make it known to the payment office whether or not an invoice conforms to the terms of the contract and may, therefore, be paid.

The collection of payment information is mandatory except in cases where recipients certify they do not have a bank account or in certain situations when an agency cannot initiate an EFT payment. In all cases, collection of the TIN and presentment of the TIN on payment vouchers is mandatory.

In light of the above discussion, and as concurred to by many Federal agency finance offices, preferred language follows:

13.501(i) "Contracting officers shall not accept EFT payment data. All such data shall be provided by the contractor directly to the payment office." should read "Payment offices shall not accept payment information. Payment information includes banking information (bank account information and unbanked certifications) and Taxpayer Identification Numbers (TINs). All such data shall be provided by the contractor directly to the contracting officer."

32.1101(a) "The payment office, not the contracting officer, determines if payment is to be made by EFT." should be changed to read "The contracting officer

should determine if payment is to be made by EFT.” In a situation where an agency does not have payment systems capable of initiating an EFT payment request, this information will have to be conveyed to the contracting officer from the payment office. (See EFT Compliance with Treasury Rule for further discussion of agency payment system limitations.) In this case the contracting officer is still responsible for collecting payment information.

32.1101(a) “The payment office may determine not to require submission of EFT information...” should be changed to read “The contracting office may determine not to require submission of payment information in cases of unbanked waivers or in certain cases of agency systems limitations, but in any case must require the submission of the TIN.” (See discussion below in Exemptions).

32.1101(b) “... require the contractor to submit such information directly to the payment office.” should read “... require the contractor to submit such information directly to the contracting office.”

32.1101(c) “...the contractor to submit a certification to that effect directly to the payment office...” should read “the contractor to submit a certification to that effect directly to the contracting office...”

52.232-33(b)(1) “The contractor is required, as a condition to any payment... unless the payment office determines that submission of the information is not required.” should read “The contractor is required as a condition of awarding the contract, to provide the Government with the information required to make payment by EFT as described in the paragraph (d) of the clause, unless the contracting officer determines that submission is not required because the recipient is unbanked or because of agency systems limitations. In all cases, however, TINs must be collected.” (See discussion below in Exemptions.)

52.232-33(c) “Prior to submission of the first request for payment ... directly to the Government payment office...” should read “Prior to awarding this contract...directly to the contracting officer...”

“If more than one payment office...” should read “If more than one contracting office...”

“...shall be responsible for providing the changed information to the designated payment office.” should read “...shall be responsible for providing the changed information to the designated contracting officer.

52.232-33(e) “...by the designated payment office...” should read “...by the designated contracting officer...”

52.232-33(g)(2)(ii) Payment in this case should be made via EFT upon receipt of correct banking information.

### **III. Section By Section Analysis**

#### **SUPPLEMENTARY INFORMATION - A. BACKGROUND**

In the second paragraph, a reference to the exemptions to certain payment recipients should emphasize the only conditions under which a payment may not be made via EFT. 31 C.F.R. 208 only exempts payments not considered newly eligible as defined in 31 CFR 208(a)(4); the recipients who certify in writing they do not have a bank account; and payments which agencies are unable to make because of system limitations. All other payments are required to be made via EFT.

The fifth paragraph includes a reference to the optional clause for payment information. The only time this clause should be used is if a Contractor certifies in writing that they don't have a bank account or an agency will not make an EFT payment because of confidentiality and national security concerns.

In the fifth paragraph, the reference to the payment official should be changed to recognize the contracting officer as the entity who will determine whether or not a payment will be made, based on all payment information being received.

In the sixth paragraph the FAR indicates that certain contracts are exempt from the legislation. 31 C.F.R. 208 only exempts payments not considered newly eligible as defined in 31 CFR 208(a)(4); the recipients who certify in writing they do not have a bank account; and payments which agencies are unable to make because of system limitations. All other payments are required to be made via EFT.

Paragraph Seven should note that all payment data should be collected from the financial institution providing credit card services. Furthermore, the issuing financial institution must collect TINs from vendors to whom it makes payments on behalf of the Federal government.

The twelfth paragraph refers to the clause 52.232-34 which makes the collection of payment data optional. The only time this clause should be used is if a Contractor certifies in writing that they don't have a bank account or an agency will not make an EFT payment because of confidentiality and national security concerns.

#### **Supplementary Information - B. Regulatory Flexibility Act**

In paragraph two, references is made to contracts that are eligible for mandatory EFT payment when discussing the impact on small business. The implication is that there are contracts that are not eligible for mandatory EFT payments and that an exemption exists for those contract payments. 31 C.F.R. 208 only exempts payments not considered newly eligible as defined in 31 CFR 208(a)(4); the recipients who certify in writing they do not have a bank account; and payments which agencies are unable to make because of

system limitations. All other payments are required to be made via EFT.

Paragraph three refers to flexibility being granted in the FAR with regard to the needs of small entities. A small entity must be paid via EFT unless the entity is not considered newly eligible as defined in 31 CFR 208(a)(4); it certifies in writing it does not have a bank account; or the agency is unable to make the payment because of systems limitations. All other payments are required to be made via EFT. This paragraph also refers to the Contractor having the right to petition the payment office to receive a check. The mandatory EFT legislation does not assign this right to any contractor or any federal payment recipient. 31 C.F.R. 208 only exempts payments not considered newly eligible as defined in 31 CFR 208(a)(4); the recipients who certify in writing they do not have a bank account; and payments which agencies are unable to make because of system limitations. All other payments are required to be made via EFT.

## **PART 13 - SIMPLIFIED ACQUISITION PROCEDURES**

In section 13.501 (i) reference is made to the contracting office not accepting payment data. FMS believes that all payment data, including banking information, Taxpayer Identification Numbers (TINs) and unbanked waiver certifications, should be collected at or before the time of award by the Contracting officer and that the Contracting officer will determine whether a payment may be made to the Contractor.

## **PART 32 - CONTRACT FINANCING**

### **32.902 Definitions**

Specified Payment Date: The last sentence of the definition indicates that if a payment instruction does not contain a specified payment date, the date will be "3 business days after the payment office releases the EFT payment transaction instruction." For Treasury Disbursed Offices (TDOs), EFT payments have next day turn-around, meaning that Treasury's Regional Financial Centers receive, process, and release vendor EFT files to the Federal Reserve on the same day they are received, and settlement takes place the next day. If there are other implications to consider for Non-Treasury Disbursed Offices (NTDOs), making it necessary for NTDOs to have 3 business days, then the specified payment date for TDOs and NTDOs should be addressed separately.

### **32.903 Policy**

The last two sentences added to this section are unclear and fail to give agencies precise guidance and instructions. The second sentence which reads "However, a specified payment date must be a valid date under the rules of the Federal Reserve System" should be changed to say "However, a specified payment date must be a valid business date for the Federal Reserve."

The last sentence should be eliminated. The Federal Reserve doesn't require a specific number of business day's notice and, therefore, this example tends to confuse the issue.

## **SUBPART 32 - ELECTRONIC FUNDS TRANSFER**

### **32.1101 Policy**

In 32.1101 (a) the first sentence of is misleading in saying that payment via EFT is required "in certain situations". It implies that there are more exemptions than, in fact, exist. 31 C.F.R. 208 only exempts payments not considered newly eligible as defined in 31 CFR 208(a)(4); recipients who certify in writing they do not have a bank account; and payments which agencies are unable to make because of system limitations. All other payments are required to be made via EFT.

Reference is made to the payment office determining whether payment should be made. FMS believes that all payment data, including banking information, Taxpayer Identification Numbers (TINs) and unbanked waiver certifications, be collected at or before the time of award by the Contracting officer and that the Contracting officer will determine whether a payment may be made to the Contractor.

This paragraph indicates that the payment office may determine that payment information is not required. FMS believes that EFT information should be required in all circumstances except when payments are not considered newly eligible as defined in 31 CFR 208(a)(4); the recipients certify in writing they do not have a bank account; and agencies are unable to make payments because of system limitations. In all cases, collection of the TIN and presentment of the TIN on payment vouchers is mandatory.

In 32.1101(c) reference is made to the submission of certification of being unbanked to the payment office. All payment data, including banking information, Taxpayer Identification Numbers (TINs) and unbanked waiver certifications, should be collected at or before the time of award by the Contracting officer and that the Contracting officer will determine whether a payment may be made to the Contractor.

32.1101(d) refers to several contract types which it claims are exempt from the provisions of mandatory EFT legislation. 31 C.F.R. 208 only exempts payments not considered newly eligible as defined in 31 CFR 208(a)(4); recipients who certify in writing they do not have a bank account; and payments which agencies are unable to make because of system limitations. All other payments are required to be made via EFT.

### **32.1103 Contract Clauses**

The wording in this section paragraphs (a) and (b) refer to contracts that "are not otherwise excepted" in accordance with 32.1101(d). This wording should be changed to "are not otherwise provided for."

32.1103 (c) contains references to 52.232-34 for optional submission of payment information. The only time this clause should be used is if a Contractor certifies in writing that they don't have a bank account or an agency will not make an EFT payment because of confidentiality and national security concerns.

## **PART 52 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES**



## **52.232-33 Mandatory Information for Electronic funds Transfer Payment**

52.232-33 (a) says that payments by the Government "may be made by check or electronic funds transfer (EFT) at the option of the Government." This wording implies more flexibility than currently exists with respect to exemptions. 31 C.F.R. 208 only exempts payments not considered newly eligible as defined in 31 CFR 208(a)(4); recipients who certify in writing they do not have a bank account; and payments which agencies are unable to make because of system limitations. All other payments are required to be made via EFT. 31 C.F.R. 208 only exempts payments not considered newly eligible as defined in 31 CFR 208(a)(4); recipients who certify in writing they do not have a bank account; and payments which agencies are unable to make because of system limitations. All other payments are required to be made via EFT.

52.232-33(b)(1) refers to the Contractor providing payment information as a condition of payment. The submission of payment information should be a condition of awarding a contract. The sentence goes on to say that this is required unless the payment office determines that submission of the information is not required. All payment data, including banking information, Taxpayer Identification Numbers (TINs) and unbanked waiver certifications, should be collected at or before the time of award by the Contracting officer and that the Contracting officer will determine whether a payment may be made to the Contractor.

52.232-33 (c) Contractor's EFT information refers to submission of payment information prior to the submission of the first request for payment. All payment data, including banking information, Taxpayer Identification Numbers (TINs) and unbanked waiver certifications, should be collected at or before the time of award by the Contracting officer and the Contracting officer will determine whether a payment may be made to the Contractor.

In 52.232-33 (d) Required EFT Information, the first sentence of this section should provide agencies with the flexibility to use other EFT payment mechanisms that may be developed in the future. We suggest changing this sentence to read as follows: "The Government may make payment by EFT through either an Automated Clearing House (ACH) subject to the banking laws of the United States, the Federal Reserve Wire Transfer System, or any other EFT payment mechanism. The method used is will be determined by the Government."

52.232-33(e) refers to the receipt of payment data by the payment office. All payment data, including banking information, Taxpayer Identification Numbers (TINs) and unbanked waiver certifications, should be collected at or before the time of award by the Contracting officer and that the Contracting officer will determine whether a payment may be made to the Contractor.

52.232-33(g) gives the Government the option of paying a Contractor by check if the Contractor provided incorrect payment information and the funds are still controlled by the Government. 31 C.F.R. 208 only exempts payments not considered newly eligible as defined in 31 CFR 208(a)(4); recipients who certify in writing they do not have a bank account; and payments which agencies are unable to make because of system limitations. All other payments are required to be made via EFT.

52.232-33 (j) gives the Contractor the right to petition the payment office to receive a check. The

mandatory EFT legislation does not assign this right to any contractor or any federal payment recipient. 31 C.F.R. 208 only exempts payments not considered newly eligible as defined in 31 CFR 208(a)(4); recipients who certify in writing they do not have a bank account; and payments which agencies are unable to make because of system limitations. All other payments are required to be made via EFT.

#### **52.232-34 Optional Information for Electronic Funds Transfer Payment**

In most cases, adequate flexibility for making payment decisions is given the Government in the Mandatory Information for Electronic Funds Transfer Payment, particularly when the government decides not to make an EFT payment because a system is unable to do so at that point in time. Therefore, the only time this clause should be used is if a Contractor certifies in writing that they don't have a bank account or an agency's system is hardwired not to make an EFT payment because of, for example, confidentiality or national security concerns. These are the only instances in which payment information may not be collected. However, TINs must still be collected and presented on payment vouchers.